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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

NO. 318

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ROCKAWAY NEWS SUPPLY CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR AMERICAN FEDERATION OF LABOR, AMICUS CURIAE

J. Albert Woll,
Herbert S. Thatcher,
James A. Glenn,
Joseph E. Finley,
736 Bowen Building,
Washington 5, D. C.,
Counsel for American Federation of Labor

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I

Reasons for Intervention as Amicus Curiae.

The American Federation of Labor has requested and been granted permission by the parties to file a brief amicus curiae on behalf of its various affiliates and their numerous members because there is here involved one of the most ancient and important rights of organized labor, namely, the right of individual members of unions to respect

picket lines established by their fellow union members. This right, while a fundamental one, may not be of the same order as those rights protected under the First Amendment, but until the decision of the Court below it was thought the right had at least the same status as the right to strike, being in its essence merely a variation of that right. Until the decision of the majority below, the Board had respected the right of union members to refuse to cross picket lines to the same degree as it had respected the rights of economic strikers, and this was true both under the Wagner Act and under Taft-Hartley. It was not thought that Taft-Hartley would diminish that right nor is there anything in the legislative history which so indicates. On the contrary, the proviso to Section 8(b)(4) of Taft-Hartley would seem to give greater or at least more explicit recognition of that right than was true under the Wagner Act. Not withstanding these considerations and others which are discussed in the Board's brief and which will be discussed in this brief (we hope without undue repetition of the Board's arguments) the Court below has decided that this right is one which has no protection at all under the Act, not even protection given to the right to strike for economic ends. It is the purpose of this brief, first, to impress upon this court the traditional and important nature of this right of union members to refrain from violating legitimate picket lines established by their fellow workers, and, second, to indicate considerations in addition which are supplemental to those made by the Board in its brief.

II

Respect for Picket Lines is a Traditional and Fundamental Trade Union Practice and is Mutual Aid and Protection in the Most Literal Sense.

The practice among labor unions, and the employees who make up their membership, of respecting the picket lines of

other labor organizations is one of the fundamental principles of trade unionism. In this principle lies much of the strength of labor solidarity that has brought trade unions to a responsible position in American society and moved employers and employees toward the building of a mature and democratic labor policy.

This principle is so fundamental that many, if not most, unions have provisions in their constitutions that their members should not cross picket lines established by other labor organizations.[1] A report of the General Executive Board of the International Ladies' Garment Workers Union, AFL, 1950, illustrates what this principle means to American workmen, in the following statement:

> "Your committee is keenly aware of the great role that respect for a picket line has played in the history of the labor movement. It is a tradition that emerged with the very first beginnings of labor organization and that has done much to foster the spirit of labor solidarity, which alone gives trade unionism whatever power it possesses. Respect for a picket line still remains a sacred and inviolable sentiment among the best of the many millions of men and women who make up the army of organized labor. It constitutes a weapon and a sanction that labor can never outgrow since it can never outgrow the idea and practice of labor solidarity that gives it its life."

A labor commentator has said in one of the leading studies on the activities of trade unions, "From the point of view of union morality, a good union man never crosses a picket line no matter whose picket line."[2]

As a matter of fact, a typical expression of trade union sentiment was made by Waugh, the employee involved in this case, who said when asked by his foreman to cross the picket line, "As a union man I would not cross that picket line and thereby become a scab or a strike breaker," and

[1] Barbash, "Labor Unions in Action," 1948, page 129.
[2] Ibid.

that he had a "right", as a union man, not to "harm another union."[3]

Awareness of the labor fact of life that union men respect picket lines is also found in numerous statements of the courts. Perhaps the best statement was made by Judge Healy of the Court of Appeals for the Ninth Circuit in *Printing Specialties and Paper Converters Union v. LeBaron*, 171 F. 2d 331 (1948), where he said at 334:

> "The reluctance of workers to cross a picket line is notorious. To them the presence of the line implies a promise that if they respond by refusing to cross it, the workers making the appeal will in turn cooperate if need arises. The converse, likewise, is implicit. 'Respect our picket line and we will respect yours.' In this setting the picket line is truly a formidable weapon, and one must be naive who assumes that its effectiveness resides in its utility as a disseminator of information. The wisdom or policy of circumscribing the use of the weapon is not, of course, a matter with which the courts are entitled to concern themselves."

Opinions of this Court made in cases not involving any question like the instant one, have given recognition to this principle in statements acknowledging the practice.[4]

The same court that rendered the decision below has stated in another opinion that employees display an "habitual unwillingness to cross picket lines."[5]

The National Labor Relations Board, the governmental agency most familiar with labor problems, has called the refusal to cross a picket line a traditional kind of action, "time honored in the history of the American labor movement," and "a necessary and unavoidable incidental effect

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[3] Brief for National Labor Relations Board, *NLRB v. Rockaway News Supply Co.* before the U. S. Court of Appeals, Second Circuit, pp. 3-4.

[4] "The customary means of enlisting the support of employees to bring economic pressure to bear on the employer," *Brotherhood of Electrical Workers v. NLRB*, 341 U. S. 694, 703; it is "traditional and permissible in a primary strike" for pickets at an industrial plant "to influence . . . employees of a customer not to cross the picket line," *NLRB v. Denver Building Trade Council*, 341 U.S. 675, 687.

[5] Frank, J., in *NLRB v. Service Trades Chauffeurs*, 191 F. 2d 65, 68.

of a form of concerted action undertaken in a conventional and traditional manner."[6]

Thus, in its traditional use by labor organizations and their members and its recognition as a labor fact of life by the courts and governmental agencies, respect for picket lines has practically become a "labor common law right."

Thus, it was only natural for Congress to add its recognition of this traditional labor right when it constructed the various provisions of the labor law. Approval of this traditional labor practice was nowhere specifically spelled out but numerous sections of the statute imply its acceptance. The most fundamental, of course, is Section 7, which protects employees' rights to assist labor organizations and to engage in concerted activities for the purpose of mutual aid or protection. The substantive aspects of whether or not a refusal to cross a picket line is protected in Section 7 has been discussed by the parties and the Court below and will not be enlarged upon here except to state that this party amicus vigorously contends that such a refusal is a protected activity within the meaning of Section 7 as held by the Court below.[7]

Congressional recognition of the traditional practice of members of one union respecting another's picket line is interwoven throughout Section 8(b)(4), the so-called secondary boycott provisions of the Act. The Congress in 1947 made it an unfair labor practice for a labor organization to induce or encourage employees of any employer to quit work or refuse to handle goods where an illegal object was involved. One of the primary forms of the inducement or encouragement that Congress was attempting to restrict was that brought about by respect for another union's picket line, since one of the principal ways in which labor organizations induce employees to quit work is to place a picket line around a place of business and rely upon the

[6] *Cyril De Cordova & Bros.*, 91 NLRB 1121, 1950.
[7] 197 F. 2d 111, 113.

traditional practice of the other employees not to cross that picket line. Congress made such activities unlawful only under certain conditions not involved here.

Then Congress went a step further, showing its complete recognition of labor's right to respect picket lines by adding the much disputed proviso to Section 8(b)(4). This proviso reads:

> "Provided that nothing contained in Section 8(b)(4) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

Whatever this proviso means, one thing appears fairly certain—Congress was adding its recognition of the long accepted right of employees to respect a picket line of a striking union.

Not only has the principle that a union workman will respect another union's picket line been given hitherto unquestioned recognition, but it is also obviously activity for mutual aid or protection. Judge Healy's remark sums up the argument, "Respect our picket line and we'll respect yours."

The respondent, in its brief, attempts to argue the obvious proposition that not every concerted activity is protected and then apparently assumes that if a refusal to cross a picket line is mutual aid or protection, it is entitled to no more approval than some of the unlawful activities this Court has refused to approve in the past.[8] But it is utter sophistry to attempt to compare the traditional, recognized practice engaged in for many decades with such conduct as sitdown strikes and like action amounting to a sabotage of the employer's operations. Judicial approval of the solution worked out by the National Labor Relations Board,

[8] Brief for respondent, pp. 19-22.

which gives some measure of protection to the employee who refuses to cross a picket line, would involve accepting conduct no more socially undesirable than an ordinary strike. The principle that the picket line will be respected is just as fundamental in our free society as is the totally accepted premise that strikes are a legal form of activity.

The respondent's argument totally fails to give due import to the equitable decision of the Board in this case, which permits the employer to run his business to his fullest satisfaction and at the same time gives his union workman who respects a picket line some measure of protection.

It is for this fundamental right that the American Federation of Labor and all its affiliates contend. The decision of the Court below constituted an unwarranted stab at one of the most fundamental of American labor practices and was a gratuitous reversal of a carefully worked out solution of the National Labor Relations Board, the agency charged by Congress with the basic responsibility for interpreting the Act.

III

Interpretation Put on the Act by the National Labor Relations Board Gives Proper Recognition to the Rights of Both Employers and Employees and Should be Approved.

The Board in this case was confronted with a conflict between the important and traditional right of individual members of labor organizations to respect the picket line of their brothers and the equally important right of the employer to direct his own business. In its legal acceptance of the strike, society has already given full recognition to one great limitation on the employer's free right to run his own business. But here a much lesser limitation is involved, although the consequences have important implications both for labor and management.

The solution worked out by the National Labor Relations Board gave recognition to the rights of both labor and man-

in an area where trade union consciousness was high enough to prevent any person, as a matter of principle, from taking Waugh's job.[9]

Then, too, Waugh's union might come to his assistance, contrary to the views of the Court below, and force the employer to yield. Or, the employer, valuing Waugh's services, might want to make the same arrangements he had earlier made before Waugh was fired, namely, have the papers brought outside the picket line for Waugh to deliver.

Under the Board's decision, even if the employer had hired a replacement, Waugh would be first on the list to be rehired in the event he wanted to capitulate and accept the employer's terms. But the Court decision strips Waugh of all his rights, permits him to be fired outright, and goes a step farther even than the 1947 Congress intended when it amended the Act.[10]

One of the great complaints of labor organizations about the decision of the Court below is that it gave little or no consideration to the equitable consequences of the Board decision. In addition, as will shortly be demonstrated, the Court below used highly doubtful legal logic to support its position. Apparently the Court below chose not to follow the Court of Appeals for the Seventh Circuit in its treatment of Board decisions which weigh competing rights under the Act. In *NLRB v. Illinois Tool Works*, 153 F. 2d 811, 816 (CA 7, 1946), Judge Kerner wrote for a unanimous Court:

> ". . . (I)t is the function of the Board to weigh the conflicts which arise from time to time out of the exercise of those rights and to determine in each case

[9] As the facts indicate, Waugh's refusal to cross the picket line was solely a matter of trade union principle.

[10] Note the opening words of Judge Clark's dissenting opinion: "While the Taft-Hartley Act reversed the trend toward unionism fostered by the Wagner Act, it did so by bringing the employer also within the aegis of administrative agency protection, and not by reversion to laissez faire," 197 F. 2d 111, 115.

> whether the interests of the employees or the interest of the employers should be held paramount . . ."

This Court, too, added its recognition of the role of the Board in *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, when it said, at 692:

> " . . . The Board's interpretation of the Act and the Board's application of it in doubtful situations are entitled to weight. . . ."

If there has ever been a situation in which valid rights of both parties are in close contention and a carefully worked-out solution of the Labor Board giving protection for both is entitled to weight, this situation is it. The Court below should have rejected the Board solution only if it was clearly erroneous in law, and it is apparent that the Board holding is not so clearly erroneous. Dissenting Judge Clark noted this in stating that: "Accordingly, I can see no legal basis for refusing enforcement of this Board order."[11]

IV

The Only "Unrealistic" Holding Was That of the Court Below.

The Court below in rejecting the Board's solution, said: "We think that the Board is wholly unrealistic . . ."[12] The Court assigned as its reasons for this view that Waugh could have been replaced as an economic striker, that it was inconceivable that Waugh could have won his strike and that had his union come to his assistance, the union would have been in violation of Section 8(b)(4), the so-called secondary boycott provisions of the Act. This evaluation of the Board's position came after the Court had al-

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[11] 197 F. 2d 111, 116.
[12] 197 F. 2d 111, 115.

ready reached its own conclusion that Waugh could be fired outright.

(a) The Weighing of Rights

In substance, the Court below first found that Waugh's right to refrain from crossing a picket line was a participation in activities for the purpose of mutual aid and protection, expressly guaranteed by Section 7 of the Act.[13] But then it followed with the contradictory revelation that this activity was not a guaranteed activity at all. It held Waugh's guaranteed right was only guaranteed on his off-duty time, when any other citizen had the same free right to refrain from crossing any line he chose. Judge Clark characterized his holding as "a practical nullification of the statutory provision."[14] We would characterize this holding as an absurdity; obviously no real substance can be attached to the right to refuse to cross a picket line unless that right exists both when a man is on his job and when he is off of his job.

The Court discussed the employer's right to run his own business and make and enforce reasonable rules covering the conduct of his employees on company time. The apparent conflict between an employer's rule that would nullify a protected statutory right of an employee was passed over by restricting the protected statutory right to off-duty time. Thus the Court weighed the conflicting rights, approved the employer's, placed a restriction we think absurd on the employee's, and added that to rule otherwise would permit an employee to unilaterally dictate the terms of his own employment.

For this last proposition, the Court cited *C. G. Conn, Ltd. v. NLRB*, 108 F. 2d 390 (CA 7, 1939), which permitted an employer to discharge employees for walking off the job at their usual quitting time after they had been scheduled

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[13] 197 F. 2d 111, 113.
[14] 197 F. 2d 111, 116.

to work overtime. The rational of the *Conn* ruling and of other similar holdings[15] is that an employee cannot unilaterally dictate the terms of his own employment. But unless some logical lines are drawn, the *Conn* doctrine can be easily carried to *reductio ad absurdum*, for even a strike for higher wages might be called an attempt at dictation of terms of employment, as many union-resisting employers of the past undoubtedly have felt.

To apply the *Conn* doctrine as loosely as has the Court below is to invite any Court disinclined to give proper weight to labor's activities to use that doctrine equally loosely and to labor's equal disadvantage. The Court below made no attempt to analyze the facts of the two cases and make the distinctions that are readily apparent. The *Conn* case, as the Board's brief points out (pp. 57-60), involved an attempt by employees to continue working on their own terms, usurping one of the employer's fundamental management rights, a situation far different from the instant case. Likewise, the Court conveniently overlooked another ruling of the same Court of Appeals that decided *Conn*, where facts were far more analogous to those in the instant case than are those in *Conn*. In *Rapid Roller Co. v. NLRB*, 126 F. 2d 452, the Court of Appeals for the Seventh Circuit ruled that discharges made by the employer were unlawful and ordered full reinstatement of the employees involved. There, one group of employees refused to undermine the strike of another group by performing the duties of those strikers, thus "dictating the terms of their employment" to the approximate degree that Waugh "attempted" to do.

(b) The Court's Assumption of a Secondary Boycott was Incorrect in Law and Fact.

A clearly erroneous feature of the ruling of the Court

[15] The Court below also relied on *NLRB v. Montgomery Ward & Co.*, 157 F. 2d 486 (CA 8, 1946) and *NLRB v. Kopman-Woracek Shoe Mfg. Co.*, 158 F. 2d 103 (CA 8, 1946), neither of which is in point, as the Board's brief points out, p. 60.

below was that Waugh could not possibly win his strike because should his union come to his assistance to aid him, the union would be in violation of Section 8(b)(4)(A),[16] the so-called secondary boycott section of the Act. The Court, in its written opinion, made no attempt to analyze the facts in their relation to the statutory provision, but merely made the broad assumption that this violation would exist and used it as a strong point in its denial of Waugh's "statutory right."

In answering the reasoning of the majority, several factors must be considered. First, the proviso to Section 8(b)(4)[17] that nothing in Section 8(b)(4) shall make unlawful the refusal of any person to enter the premises of any employer if that employer's employees are engaged in an approved strike, immediately embroils the majority into difficulties it has not even attempted to answer. Section 2(1) of the Act includes "labor organization" within its definition of "person." Thus, if Waugh's union decided as a concerted policy that none of its members should cross the third party picket line, the 8(b)(4) proviso would accordingly protect its conduct. The Court did not consider this. And, if the employer had to rely on Waugh's fellow union members to cross the same picket line that Waugh refused to cross in order to keep his business going, he

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[16] Sec. 8(b)(4)(A): "It shall be an unfair labor practice for a labor organization or its agents—To engage in, or to induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person."

[17] "PROVIDED, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by representative of such employees whom such employer is required to recognize under this Act."

might be compelled to yield and allow Waugh to win his strike, contrary to the Court's imagined outcome.

But even without the proviso or a concerted refusal to cross by the union, an outright strike by Waugh's union for the purpose of his reinstatement would not be a secondary boycott violation. An ordinary strike by a union for reinstatement of one of its members is a lawful economic strike,[18] and far more than indicated by the instant facts would be required to turn it into unlawful secondary action. In this case, there is nothing more than the sweeping assumption that the only purpose of such activity would have been to force Waugh's employer into ceasing doing business with the struck newspaper plant. This is tantamount to saying that a striking union, pressing a primary employer for increased wages, with a picket line around his plant, has as its purpose or object the forcing of all other employees into a ceasing of doing business and therefore the activity violates the law. Certainly a striking union with a picket line hopes to keep out all who would enter, including the employees or other employers which would cause those third party employers to cease doing business with the struck employer. But this general purpose, incident to every picket line, does not make every strike and every picket line unlawful. Section 8(b)(4)(A)[19] requires an illegal object and this object must be more than a loose "omnipresence in the sky." It must be a certain, specific, object related to compelling a specific employer to cease doing business with another employer, with a provable link of related factors demonstrating this purpose.

This Court, as have lesser tribunals, has given recognition to the need for proving such an unlawful object. In weighing the conflicting interests in *National Labor Relations Board v. Denver Bldg. & Construction Trades Council*, 341 U.S. 675, at 687, this Court said: "We must first de-

[18] *NLRB v. Globe Wireless, Ltd.*, 193 F. 2d 748 (CA 9, 1951).
[19] Note 16, Supra.

termine whether the strike in this case had a proscribed object." Then Mr. Justice Burton, for the majority, went on to sum up the concrete proof that demonstrated an object or purpose of the union's activity. In that case, the union had a direct interest in causing an employer to cease doing business with another particular employer with whom it had a long standing labor dispute.

In *Elliott v. Amalgamated Meat Cutters*, 91 F. Supp. 690 (W.D., Mo., 1950), another secondary boycott case, the Court said:

> "To warrant an unfair labor practice finding in this case under Section 8(b)(4)(A), two factors must combine . . . (1) the alleged activities must have as an object the forcing or requiring any employer, inter alia, to cease using the products of any manufacturer or to cease doing business with any person: and (2) the activities must constitute inducement and encouragement of employees in the course of their employment within the meaning of Section 8(b)(4)(A). The absence of either factor will defeat the charges here made as to any 8(b)(4)(A) violations. *Printing Specialties and Paper Converters Union v. LeBaron*, 171 F. 2d 331."

The National Labor Relations Board has consistently required proof of an illegal object in its handling of unfair labor practice cases and will dismiss a complaint unless the object is shown. Thus, in *Oil Workers' International Union*, 84 NLRB 315, 319, it said:

> "Moreover, on the facts of this case we would be compelled to dismiss the complaint on yet another ground, because we are not persuaded that *an object* of the Union's activity was forcing or requiring Pure Oil to cease doing business with Standard Oil or Great Lakes to cease doing business with Pure Oil."

Thus, before any violation of the law by Waugh's union could be shown, it would be necessary to prove that a specific object of that action was to force the respondent Rockaway News Supply Co. to cease doing business with the struck

newspaper plant. But a strike against Rockaway would not have that object at all—but only the goal of reinstatement of Waugh. If such action compelled Rockaway to cease doing business with the struck plant, it would have the same kind of incidental effect that any primary strike would have when third party employers were forced to cease doing business with a struck employer. What would need to be proved would be a showing that Waugh's union would stand to benefit in some ascertainable concrete manner by a cessation of business between Rockaway and the newspaper plant, and that such cessation was a specific object of the union's action. Upon the facts of this case, such a showing would be impossible.

And when the facts are further reviewed, it is clear not only that affirmative proof would be lacking but that compelling evidence to the contrary is present. Waugh, after his first refusal to cross the picket line, actually picked up newspapers from the struck plant as long as someone brought the papers outside the picket line for delivery to him. Then he went ahead with his duties and full business relations between Rockaway and the newspaper were continued as before. It was only when Waugh's employer refused to continue the practice of having someone else bring the papers outside the picket line that an impasse was reached. Accordingly, Waugh continued his refusal to cross the picket line, which was not a refusal to handle the struck employer's goods, and was fired by Rockaway.

Thus, the Court's broad assumption that speculative action in the future would violate a section of the law not directly involved in this case is incorrect. One of its major points in support of its reasoning is removed.

(c) Court Inspired Bargaining Aims.

There is still another harmful aspect of the Court's ruling, if it be allowed to stand. Respect for picket lines may become a new issue interjected into collective bargaining,

as unions will be forced to insist upon a clause relieving their members from liability for refusing to cross a third party picket line. That Courts will give effect to similar mutually-agreed-on provisons is apparent from the recent decision in *Rabouin v. NLRB*, 195 F. 2d 906 (CA 2, 1952), in which the Court approved provisions that permitted union men not to work on non-union goods. These new terms and provisions forced into collective bargaining agreements for protection of legitimate employee rights can only project collective bargaining into new tangles of litigation. And to the extent that employers, encouraged by dubious court decisions, resist such labor demands, to that extent will labor strife and discord be increased.

Therefore, the American Federation of Labor as amicus curiae respectfully urges reversal of the decision of the Court below and enforcement of the order of the National Labor Relations Board.

Respectfully submitted,

J. Albert Woll,
Herbert S. Thatcher,
James A. Glenn,
Joseph E. Finley,
736 Bowen Building,
Washington 5, D. C.,

Counsel for American Federation of Labor